MONTANA ADMINISTRATIVE PROCEDURES

STUDY

P A R T I I

PROPOSED

MONTANA ADMINISTRATIVE PROCEDURE ACT

WITH

EXPLANATORY COMMENTS

Submitted to:

Montana Legislative Council

By:

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INTRODUCTION

The Forty-first Session of the Montana Legislature (1969), by joint resolution of the Senate and House of Representatives, requested that the Legislative Council conduct a study to determine the feasibility and desirability of adopting a uniform administrative procedure act for the State. On the basis of a detailed study of state administrative procedures, it is the author's opinion that the adoption of a state administrative procedure act is feasible, desirable and an urgent necessity. Specific findings and conclusions are presented under separate cover in Part I of the Montana Administrative Procedures Study.

The joint resolution of the legislature contemplates the possibility of adopting an administrative procedure act like the Revised Model State Administrative Procedure Act (herein referred to as the Revised Model Act) recommended by the National Conference of Commissioners on Uniform State Laws (herein referred to as the Commissioners). Accordingly, a few remarks about the Revised Model Act, which was approved by the Commissioners in 1961, are appropriate. The Revised Model Act and its predecessor, the Model State Administrative Procedure Act (herein referred to as the Model Act) approved by the Commissioners in 1946, are the product of long and comprehensive study dating back to 1933. The Revised Model Act reflects changes which the Commissioners thought appropriate after a period of experience with the Model Act. More than half of the states have adopted, substantially adopted or patterned their administrative procedure acts after the Model Act or the Revised Model Act.

As the name implies, the Revised Model Act is not intended to be a uniform act to be adopted by all states in the exact form approved by the Commissioners. Rather it is a model and it was anticipated that

additions or modifications would be made to meet local conditions.

The Commissioners have made the following comment regarding the content of the Revised Model Act:

> "The act deals primarily with major principles, not with minor matters of detail. Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state. Each state and each agency must work out these details for itself according to the necessities of the situation. However, there are certain basic principles of common sense, justice, and fairness that can and should prevail universally. The proposed act incorporates these principles, with only enough elaboration of detail to support the essential major features.
>
> The major principles embraced in the Act as adopted by the Conference are:
>
> (1) Requirement that each agency shall adopt essential procedural rules, and, except in emergencies, that all rule-making, both procedural and substantive, shall be accompanied by notice to interested persons, and opportunity to submit views or information;
>
> (2) Assurance of proper publicity for all administrative rules;
>
> (3) Provision for advance determination of the validity of administrative rules, and for "declaratory rulings," affording advance determination of the applicability of administrative rules to particular cases;
>
> (4) Assurance of fundamental fairness in administrative adjudicative hearings, particularly in regard to such matters as notice, rules of evidence, the taking of official notice, the exclusion of factual material not properly presented and made a part of the record, and proper separation of functions;
>
> (5) Assurance of personal familiarity with the evidence on the part of the responsible deciding officers and agency heads in quasi-judicial cases;
>
> (6) Provision for proper proceedings for and scope of judicial review of administrative orders, thus assuring correction of administrative errors.
>
> There is no good reason why these general principles should not govern throughout the entire administrative structure. They are not details; they are essential safeguards of fairness in the administrative process. Yet too many state statutes are

altogether deficient in regard to them.

> Recent years have, however, been bringing forth in many quarters profound apprehension over the undisciplined growth of administrative powers, and this is the reason why the Congress and several state legislatures have been sufficiently concerned to take affirmative action.
>
> The Model State Administrative Procedure Act is offered by the National Conference of Commissioners in the hope that it will serve a good purpose in states that may be considering the adoption of such legislation or the revision of acts already on the statute books. The Model Act will, of course, require careful adjustment to the special statutory conditions peculiar to the state under consideration but the general principles set forth are of universal applicability and the suggested language will also be found helpful."

The Commissioners have further stated that the purpose of the Revised Model Act is to give "assurance...of reasonable uniformity of practice and fair procedural methods for the benefit of all persons affected by state administrative action."

The following pages contain a proposed Montana Administrative Procedure Act (herein referred to as the MAPA), which is recommended for adoption by the Forty-second Legislature. The MAPA is patterned after the Revised Model Act. However, there are modifications and additions which are deemed appropriate for the State of Montana. Many other sources were considered in drafting the MAPA. These sources are mentioned in Part I of the Montana Administrative Procedure Study and, with one exception, will not be mentioned here.

It is worthy of note that previous studies have been made and previous administrative procedure act bills have been submitted to the legislature. The most recent such bill was Senate Bill No. 179, submitted to the Thirty-sixth Legislative Assembly (1959). That proposal was patterned after the Model Act (before the 1961 revision), but also contained modifications and additions deemed appropriate for Montana.

The various sections and subsections of the MAPA are followed by citations of comparable sections of the Revised Model Act and Senate Bill No. 179. In addition, sections and subsections are followed by explanatory comments which include one or all of the following: an explanation of the provision, remarks regarding the effect that the provision would have on state administrative procedures, and an explanation of modifications of or additions to the Revised Model Act.

Included therein with the MAPA are copies of the Revised Model Act (attached as Appendix I) and Senate Bill No. 179 (attached as Appendix II). The text of these two acts are included to facilitate comparison of comparable provisions and to aid in more fully understanding the current proposal.

MONTANA ADMINISTRATIVE PROCEDURE ACT

TITLE I - TITLE AND DEFINITIONS

Section 101. SHORT TITLE. This act shall be known and may be cited as the "Montana Administrative Procedure Act."

Section 102. DEFINITIONS. For purposes of this act:

(a) "agency" means any board, bureau, commission, department, authority or officer of the state government authorized by law to make rules and to determine contested cases, except that the provisions of this act shall not apply to the following:

(1) the legislature and any branch, committee or officer thereof;

(2) the judicial branches and any committee or officer thereof;

(3) the governor, except that an agency otherwise covered by this act shall not be exempt because the governor has been designated as a member thereof;

(4) the state military establishment and agencies concerned with civil defense and recovery from hostile attack;

(5) the State Board of Pardons, except that said board shall be subject to the requirements of sections 201 and 203 of this act and its rules shall be published in the Montana Administrative Code and Register;

(6) the supervision and administration of any penal, mental, medical or eleemosynary institution with regard to the admission, release, institutional supervision, custody, control, care or treatment of inmates, prisoners or patients;

(7) the administration and management of educational institutions;

(8) the financing, construction and maintenance of public works.

rules describing agency organization and procedures, public inspection of rules, and filing and effective date of rules. The Board's rules must also be published in the Montana Administrative Code and Register.

The supervision and administration of state institutions are exempt because, to a large degree, such matters are regulated by statute and directly involve basic constitutional rights. It is believed that determinations regarding such matters can be handled better by courts than by administrative bodies. In addition, it would not be practical for institution personnel to follow MAPA procedures for many determinations and judgments which they must make, particularly with regard to individual inmates, prisoners or patients.

The administration and supervision of educational institutions has been exempt from coverage for two reasons. First, state laws relating to education are presently under study and may be modified. Second, it is believed that the desirability and feasibility of placing educational institutions, in part or in whole, within the coverage of the MAPA should be the subject of an independent study. It is believed that the elimination or modification of the exemption should be considered at a later date when the state has had experience with an administrative procedure act and studies with regard to education statutes have been completed and implemented.

Functions relating to public works have been exempt because it is felt that it would not be practical if such functions were subject to procedures set forth in the MAPA and so as not to jeopardize construction schedules, financing plans or eligibility for financial aid programs.

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(b) "rule" means each agency regulation, standard or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule, but does not include:

(1) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;

(2) declaratory rulings issued pursuant to section 401 of this act;

(3) intra-agency memoranda;

(4) rules relating to the use of public works, facilities, streets, and highways, when the substance of such rules is indicated to the public by means of signs or signals;

(5) seasonal rules adopted annually relating to hunting, fishing and

trapping when there is a statutory requirement for the publication of such rules, and rules adopted annually relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of such rules is indicated to the public by means of signs or signals;

(6) rules relating to personnel standards, job classifications, or salary ranges for agency employees;

(7) uniform rules adopted pursuant to interstate compact, except that such rules shall be filed in accordance with section 302 of this act and shall be published in the Montana Administrative Code and Register.

Comparable Provisions

Rev. Model Act, Section 1(7)

Senate Bill No. 179, Section 102(b)

Comment

Except for the addition of the words "regulation, standard or" the basic definition of "rule" is the same as that found in the Revised Model Act. "Regulation" and "standard" are words which are used with some frequency in the various Montana statutes and it is felt that the incorporation of the terms in the definition of "rule" is desirable for that reason.

The definition includes substantive rules, procedural rules and rules which describe the organization of an agency. A rule may be of "general applicability" even though it is of immediate concern only to a single person or a small group, provided the form of the rule is general and others who fall within the regulated category in the future will come within its coverage.

The first three exceptions from the definition are only the exceptions contained in the Revised Model Act. They are included so that agencies will not be unduly restricted regarding internal matters and to encourage agencies to utilize the practice of issuing declaratory rulings. Four additional exemptions have been added.

Rules relating to the use of public works, facilities, streets and highways are exempt so that it will not be necessary to follow rule-making procedures to establish or change highway speed limits, hours when public

facilities are open to the general public and similar regulations.

Seasonal rules relating to hunting, fishing, trapping and the recreational use of state owned or controlled lands and waters are exempt because such rules often must be adopted on short notice or under circumstances when it would be impractical to use rule-making procedures. In addition, they are normally in effect for a shorter period than the 120 days permitted for emergency rules which may be adopted without notice or hearing under subsection 202(b) of the MAPA

It would not be practical to make rules relating to personnel standards, job classifications and salary ranges for agency personnel subject to rule-making procedures. To insure that they are not, a specific exemption has been included.

Finally, uniform rules adopted pursuant to interstate compact have been excepted from the definition of "rule." If the rule-making requirements contained in the MAPA were applied to such rules it would be inconsistent with the intent of interstate compacts to develop uniform rules in participating states. However, there is still a need for public information regarding these rules. The exception is qualified by the requirement that the interstate compact rules shall be filed with the secretary of state in the same manner as other rules and shall be published in the Montana Administrative Code and Register.

Under Senate Bill No. 179, price-fixing and rate-making were included in the definition of rule. These proceedings are included within the definition of "contested case" in Section 102(c) MAPA.

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(c) "contested case" means any proceeding before an agency in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing. The term includes, but is not restricted to, rate-making, price-fixing and licensing.

Comparable Provisions

Rev. Model Act, Section 1(2)

Senate Bill No. 179, Section 102(c)

Comment

The definition of "contested case" is the same as that in the Revised Model Act, except that the order of words has been altered. The alteration is intended to clarify, not change, the definition.

The definition is broadly phrased so as to include all proceedings in which the basic concepts of due process should be applied to protect private

rights and the public interest. Contested case hearings are "trial-type" hearings and due process safeguards are provided for in the MAPA.

In contrast to Senate Bill No. 179, price-fixing and rate-making proceedings are included within the definition of "contested cases" rather than "rule." This is done because such proceedings typically involve factual determinations which should be based upon a record where the parties are able to cross-examine, introduce rebuttal evidence and have available other protections which are available in contested case proceedings, but not required in rule-making proceedings.

The definition refers to determinations which are "required by law" to be made after an opportunity for hearing. This has broader meaning than merely a statutory requirement for an opportunity for hearing. It includes situations where a hearing is required as a matter of constitutional right. Thus, a hearing may be required even though an applicable statute does not provide for one. The words "required by law" have the same broad meaning when used in other sections of the MAPA.

The definition is not intended to include informal preliminary inquiries or investigations made to determine if formal "contested case" proceedings should be instituted.

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(d) "license" includes the whole or part of any agency permit, certificate, approval, registration, charter or other form of permission required by law, but does not include a license required solely for revenue purposes.

Comparable Provisions

Rev. Model Act, Section 1(3)

Senate Bill No. 179, Section 102(d)

Comment

This definition is the same as that in the Revised Model Act. The provision regarding licenses "solely for revenue purposes" is intended to exclude from coverage licensing which is purely routine or ministerial in nature.

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(e) "licensing" includes any agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation or amendment of a license.

Comparable Provisions

Revised Model Act, Section 1(4)

Senate Bill No. 179, Section 102(d)

Comment

This definition is the same as that in the Revised Model Act, except that the word "limitation" is added.

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(f) "party" means any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

Comparable Provisions

Rev. Model Act, Section 1(5)

Senate Bill No. 179, (none)

Comment

The principle definition of "party" is the same as in the Revised Model Act. The additional phrase "but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes" has been added to permit agencies to allow interested persons or agencies, who are not sufficiently involved to be parties, to appear where a diversity of viewpoint is desirable in reaching a determination. It is comparable to procedures used by courts in permitting persons to appear as friends of the court.

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(g) "person" means any individual, partnership, corporation, association, governmental subdivision, or public organization of any character other than an agency.

Comparable Provisions

Rev. Model Act, Section 1(6)

Senate Bill No. 179, Section 102(e)

Comment

This definition is as the one in the Revised Model Act.

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TITLE II - RULE MAKING

Section 201. RULES DESCRIBING AGENCY ORGANIZATION AND PROCEDURES; PUBLIC INSPECTION OF RULES; MODEL RULES.

(a) In addition to other rule-making requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(3) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

(4) upon request of any person or agency, provide a copy of any rule. Unless otherwise provided by statute, an agency may require the payment of the cost of providing such copies.

(b) No agency rule shall be valid or effective against any person or party whose rights have been substantially prejudiced by an agency's failure to comply with the public inspection requirement herein.

(c) The attorney general shall prepare, as soon as is practicable after the passage of this act, a model form for a rule describing the organization

of agencies and model rules of practice for agencies to use as a guide in fulfilling the requirements of section 201(a). The attorney general shall add to, amend or revise the model rules from time to time as he shall deem necessary for the proper guidance of agencies. The model rules, and any additions, amendments or revisions thereto, shall be appropriate for the use of as many agencies as is practicable and shall be filed with the secretary of state and provided to any agency upon request. The adoption by an agency of all or part of the model rules shall not relieve the agency from following the rule-making procedures required by this act.

Comparable Provisions

Rev. Model Act, Section 2

Senate Bill No. 179, Section 201(a)

Comment

This section is one of the most significant in the MAPA. It, together with the filing and publication requirements in sections 203 and 204, will correct two of the most serious deficiencies which exist in administrative practice in the state, lack of public information concerning the actual procedures and policies of state agencies, and lack of knowledge by agency personnel of procedures and policies which should be followed or have been followed in the past.

Section 201(a) requires that each agency adopt rules which describe its organization, its method of operation, the method by which the public may communicate with the agency and state procedures for practice before the agency. It further requires that rules, as well as statements of policy or interpretations used by the agency, must be open to public inspection and that the agency furnish copies of rules upon request. In order to prevent burdensome expense to agencies, they are authorized to charge the cost of rules so furnished.

The statutes for very few state agencies require the adoption of procedural rules. Some authorize, but do not require, their adoption. In most cases there is no express reference to procedural rules. However, many statutes give agencies general rule-making authority, such as authority to adopt rules to affectuate the purposes of the act, which is broad enough to authorize the adoption of procedural rules. Even where there is specific direction to adopt procedural rules there is generally an inadequate indication of what should be included. As a result of the foregoing, most agencies either have no procedural rules or rules which

are incomplete and inadequate. Some agencies are operating under the incorrect assumption that they do not have authority to adopt procedural rules. Subsection (a) will eliminate such confusion and insure that each agency adopts adequate procedural rules for the guidance of the public and agency personnel and will have the effect of stabilizing agency procedures.

Subsection (b) provides for a sanction where a person's rights have been "substantially prejudiced" by an agency's failure to comply with the public inspection requirement of section 201(a). Section 2(b) of the Revised Model Act contains a tougher sanction provision. It states that, in the absence of actual knowledge to the party involved, a rule shall not be valid or effective unless the public information requirements are met. This may be warranted under the provisions of the Revised Model Act, because a rule thereunder may be made effective 20 days after filing with the secretary of state and before there is any general publication of the rule (see Revised Model Act, sections 4(2) and 5(b)). Accordingly, there may be a period of time where the only place where a new rule can be seen is at the secretary of state's office or the place where the agency makes its rules available for public inspection. Under the MAPA, rules do not become effective until 10 days after publication in the Montana Administrative Register, which is distributed throughout the state (see MAPA, sections 203(b) and 204(d)).Under the circumstances, it is felt that the less stringent sanction provision is warranted in the MAPA.

Many agencies, such as the smaller licensing boards, do not have personnel who are trained in administrative procedures and do not have the financial means to employ full-time legal counsel. Such agencies will need guidance in preparing procedural rules. Subsection (c) is intended to meet this need. It is also intended to encourage uniformity in procedural rules adopted by the various agencies. Section 201(c) is similar to section 201(a)(2) of Senate Bill No. 179. There is no comparable provision in the Revised Model Act.

Section 2(4) of the Revised Model Act provides for public inspection of agency orders and decisions. A comparable provision is contained in section 305 of the MAPA, which relates to decisions and orders in contested cases.

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Section 202. ADOPTION; AMENDMENT OR REPEAL OF RULES; EMERGENCY RULES.

(a) Prior to the adoption, amendment or repeal of any rule, the agency shall:

(1) give written notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, place where, and manner in which

interested persons may present their views thereon. The notice shall be filed with the secretary of state for publication in the Montana Administrative Register as provided in section 204(b) of this act and mailed to all persons who have made timely requests to the agency for advance notice of its rule making proceedings. The notice shall be published and mailed at least twenty (20) days in advance of the agency's intended action. If any statute shall provide for a different method of publication, the affected agency shall comply with the statute in addition to the requirements contained therein. However, in no case shall the notice period be less than twenty (20) days.

(2) afford all interested persons reasonable opportunity to submit data, views, or argument orally or in writing. In the case of substantive rules, opportunity for oral hearing shall be granted if requested by either ten (10) per cent or twenty-five (25) of the persons who will be directly affected by the proposed rule, by a governmental subdivision or agency or by an association having not less than twenty-five (25) members who will be directly affected. Contested case procedures need not be followed in hearings held pursuant to this section. Where a hearing is otherwise required by statute, nothing herein shall be deemed to alter that requirement. The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency, if requested to do so by an interested person either prior to adoption or within thirty (30) days thereafter, shall issue a concise statement of the principle reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption.

(b) If an agency finds that an imminent peril to the public health, safety or welfare requires adoption of a rule upon fewer than twenty (20) days notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period not longer than one hundred and twenty (120) days, but the adoption of an identical rule under subsections (a)(1) and (a)(2) of this section is not precluded. The sufficiency of the reasons for a finding of imminent peril to the public health, safety or welfare shall be subject to judicial review.

(c) No rule adopted after the effective date of this act shall be valid unless adopted in substantial compliance with subsection (a) and (b) of this section. A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this section must be commenced, or any defense contesting a rule on such grounds must be raised,within two (2) years from the effective date of this rule.

(d) An agency may use informal conferences and consultations as a means of obtaining the viewpoints and advice of interested persons with respect to contemplated rule making. An agency may also appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rule making. The powers of such committees shall be advisory only. Nothing herein shall relieve the agency from following rule-making procedures required by this act.

(e) Rules shall not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting the language, the reference shall clearly indicate that portion of the language which is statutory and the portion

which is amplification of the language. Each rule shall include a citation of authority pursuant to which it, or any part thereof, is adopted.

(f) Each agency shall at least annually review its rules to determine if any new rule should be adopted or any existing rule should be modified or repealed.

Comparable Provisions

Rev. Model Act, Section 3

Senate Bill No. 179, Section 201(c) - (e)
Section 202

Comment

The rule-making process is an important administrative function, yet few state agencies have rule-making procedures. The study of state administrative procedures revealed that the members of some agencies were not in office when current rules were adopted and/or are unfamiliar with the rule-making procedures that have been followed in the past or that should be followed in the future. Relatively few agencies permit participation by interested persons.

Section 202 describes the proceedings which must be followed by agencies in adopting rules and provides for public notice of rule-making so that interested persons can submit data, views and argument. The section applies to both procedural and substantive rules. Agency rules may have a substantial impact, and it is in accord with basic principles of fairness that interested persons should be given an opportunity to participate in the adoption process. Public participation also provides a means for an agency to obtain information about the areas to be regulated and possible deficiencies in its intended action. It has also been suggested that the opportunity for such participation is good public relations which will lead to greater confidence in and more willing compliance with rules.

Section 202(a)(1) provides for notice of intended rule-making action. Much of the language is the same as that in section 3(a)(1) of the Revised Model Act. There are alterations in the structure and wording because the Revised Model Act's language is appropriate for newspaper or like publication. Section 202(a)(1) provides for publication in the Montana Administrative Register. Register will be widely circulated throughout the state and may be subscribed to by interested persons (see section 204(d) of the MAPA). It is felt that this is the most expedient, reliable and economical method of providing general notice of rule-making proceedings. Section 202(a)(1) also provides for notice by mail to persons who make an appropriate request.

If an agency is otherwise required by statute to give notice by newspaper or other publication, such requirement must be complied with in addition to the requirement in the MAPA. In order to avoid conflict

between the MAPA and other statutes regarding the notice period, a minimum 20 day period is established.

Section 202(a)(2) describes the extent to which interested persons have a right to participate in rule-making proceedings and the agency's obligation to consider their submissions. Agencies need not conduct a hearing prior to the adoption of procedural rules. In the case of substantive rules, a hearing is required upon request of 10 per cent or 25 of the persons directly affected by the rule-making or an association representing at least 10 per cent or 25 persons directly affected or a governmental subdivision or agency. In the absence of such a request, no hearing is required prior to the adoption of substantive rules.

Section 202(a)(2) follows section 3(a)(2) of the Revised Model Act with four exceptions. First, the Revised Model Act requires a substantive rule-making hearing when requested by 25 persons. The alternative ten per cent requirement has been added because some state agencies regulate comparatively small groups. This addition gives the hearing requirement greater flexibility and insures that there is not a disparity in treatment between small and large regulated groups. Second, the persons requesting the hearing must be "directly affected." This has been added to insure that agencies need not go through the trouble and expense of a hearing unless the parties requesting it have a substantial interest in the proceeding. Third, language is added which states that rule-making hearings are not subject to contested case procedures. Fourth, language has been added to insure that where hearings are otherwise required by statute, that requirement will not be changed. Some statutes require a hearing in rule-making proceedings.

Section 202(b) provides for the adoption of emergency rules without notice or with abbreviated notice. It follows the wording of section 3(b) of the Revised Model Act, except a final sentence is added to make it clear that an agency's emergency findings will be subject to court review. There is no provision for renewal of emergency rules, because it is felt that the 120 day effective period is ample for completion of conventional rule-making procedures.

Section 202(c), which provides for a sanction for non-compliance with rule making procedures, is patterned after section 3(c) of the Revised Model Act. However, in section 3(c) the 2 year limitation period relates only to commencing actions to contest rules. Language has been added to extend the limitation period to situations where non-compliance is raised as a defense.

Section 202(d) has been inserted to make it clear that the useful techniques described therein may be employed in the rule-making process, in addition to the formal requirements. These techniques are presently employed by some state agencies. There is no such provision in the Revised Model Act. Section 201(d) of Senate Bill No. 179 contains a similar provision.

The purpose of section 202(e) is to insure that agency rules will not merely restate statutory language. It should also be helpful in eliminating the apparent misconception of some agency personnel that statutes and agency

rules are the same thing. There is no comparable provision in the Revised Model Act. Section 202(e) is similar to section 201(e) of Senate Bill No. 179.

There is no provision like section 202(f) in the Revised Model Act or in Senate Bill No. 179. The study of administrative procedures revealed that many agencies have gone for long periods without review or needed modification of their rules. It is hoped that the requirement of annual review will correct this problem.

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Section 203. FILING OF RULES: EFFECTIVE DATE OF RULES.

(a) On or before the sixtieth day following the effective date of this act, each agency shall file with the secretary of state a certified copy of each rule adopted by it on or before the effective date of this act and remaining in effect. Any rule not so filed shall be deemed to have been abrogated by the agency and shall be void and of no effect.

(b) Each agency shall file with the secretary of state a certified copy of each rule adopted by it subsequent to the effective date of this act. Each such rule shall become effective ten (10) days after publication thereof in the Montana Administrative Register or Code as provided in section 204 of this act, except that:

(1) if a later date is required by statute or specified in the rule, the later date shall be the effective date;

(2) subject to applicable constitutional or statutory provisions, an emergency rule shall become effective immediately upon filing with the secretary of state, or at a stated date less than ten (10) days following publication in the Montana Administrative Code or Register, if the agency finds that this effective date is necessary because of imminent peril to the public health, safety or welfare. The agency's finding and a brief statement of reasons therefor shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to every person who may be affected by them.

(c) The secretary of state may prescribe a format, style and arrangement for rules which are filed pursuant to this act and may refuse to accept the filing of any rule that is not in substantial compliance therewith. He shall keep and maintain a permanent register of all rules filed (including superseded and repealed rules), which shall be open to public inspection, and shall provide copies of any rule upon request of any person or agency. Unless otherwise provided by statute, the secretary of state may require the payment of the cost of providing such copies.

Comparable Provisions

Rev. Model Act, Section 4

Senate Bill No. 179, Sections 203 and 204

Comment

At the present time there is no provision for central filing of the rules for all state agencies. Not all agencies have their business offices in the state capitol. Many are scattered thoughout the state. In some instances the locations change with a change in agency personnel. As a result, it is sometimes difficult to determine if a particular agency has adopted rules and, if it has, to obtain copies.

Sections 203 and 204 of the MAPA are intended to alleviate the problems which are created by this situation by providing for central filing and statewide distribution of all agency rules.

Section 203 states filing requirements for all rules. It contains specific filing requirements for rules in effect on the effective date of the MAPA and for rules adopted thereafter. Except in the case of emergency rules and rules where a later date is specified in the rule or required by statute, new rules are effective 10 days after publication in the Montana Administrative Register (see section 204(b)). Under section 4(b) of the Revised Model Act, with the same two exceptions noted above, rules are effective 20 days after filing with the secretary of state. Under this scheme, a rule could be effective before it is published on a statewide basis in the Register (referred to as a bulletin in section 5(b) of the Revised Model Act), since the Register is published monthly. Basic principles of fairness dictate that individuals should not be required to comply with a rule until a reasonable attempt has been made to give notice of its existence. It is felt that making rules effective 10 days after publication in the Register, which provides statewide publication, is more consistent with these principles than the comparable provision in the Revised Model Act.

Under section 203(b)(2) an emergency rule may be effective upon filing with the secretary of state (before publication in the Register). However, in this case the agency is required to take appropriate measures to make the rule known to all affected persons.

Section 4(a) of the Revised Model Act requires the filing of rules in existence on the effective date of the act, but does not give a deadline. Section 203(a) specifies 60 day deadline. It is felt that a deadline is important because of the public interest in having central filing at an early date, to give specific instructions to agencies with regard to the filing requirement and so that the secretary of state will not be unduly delayed in compiling, indexing and publishing the Montana Administrative Code pursuant to section 204(a).

Section 203(c) gives the secretary of state authority to prescribe a standard format,style and arrangement for rules. The study of state administrative procedures revealed that there is a substantial lack of uniformity in the form in which agencies adopt and publish rules. It will be a great assistance to the secretary of state, especially in the compiling and indexing of the Code and Register, if rules are filed in a uniform style and format. Any inconvenience to particular agencies will be relatively slight in comparison to the inconvenience to the secretary of state caused by a lack of uniformity. The Revised Model Act has no such provision. A comparable provision is found in section 203 of Senate Bill No. 179.

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Section 204. PUBLICATION AND DISTRIBUTION OF RULES AND NOTICES.

(a) The secretary of state shall, as soon as is practicable after the effective date of this act, compile, index and publish all rules filed pursuant to this act in a publication which shall be known as the Montana Administrative Code (herein referred to as the Code). The Code shall be printed or otherwise duplicated, in loose-leaf form. The secretary of state shall revise the Code, or any part thereof, as often as he deems necessary.

(b) The secretary of state shall monthly compile and publish the Montana Administrative Register (herein referred to as the Register). The Register shall contain two sections, a Rules Section and a Notice Section.

(1) The Rules Section of the Register shall contain all rules filed with the secretary of state since the compilation and publication of the preceding issue of the Register, and in the case of the first issue, since the effective date of this act, except

that nothing herein shall require that rules filed pursuant to section 203(a) be published in the Register. This section of the Register shall be printed or duplicated in the same style as the Code and shall be set up so as to permit changes to be inserted as pages in the Code in lieu of the pages containing superseded material and to permit additions to the Code.

(2) The Notice Section of the Register shall contain all rule-making notices filed with the secretary of state pursuant to section 202 of this act since the compilation and publication of the preceding Register, and in the case of the first issue of the Register, since the effective date of this act. This section shall be printed or duplicated in such manner as to make it easily distinguishable from the Rules Section of the Register and so that separate copies of the Notice Section can be provided to any person upon request to the secretary of state. The secretary of state may require the payment of the cost of providing such copies.

(3) Each issue of the Register shall contain a title page with the name "Montana Administrative Register," the issue number and date of the Register and a table of contents. Each page of the Register shall contain the issue number and date of the Register of which it is a part. The secretary of state may include in the Register instructions or information to help the user in correctly making insertions or deletions in the Code and to keep the Code current.

(c) The secretary of state, with the consent of the adopting agency, may omit from the Code or Register any rule the publication of which would be

unduly cumberson, expensive or otherwise inexpedient, if the rule in printed or duplicated form is made available on application to the agency, and if the Code or Register contains a notice stating the general subject matter of the omitted rule and stating how a copy thereof may be obtained.

(d) The Code shall be arranged, indexed and printed or duplicated in such manner as to permit separate publication of portions thereof relating to individual agencies. An agency may make arrangements with the secretary of state for the printing of as many copies of such separate publications as it may require. The cost of any such separate publications shall be paid by the agency.

(e) The secretary of state shall distribute copies of the Code, revisions thereto and the Register without charge to the following:

Attorney general, 1 copy

Clerk of each court of record of this state, 1 copy

Clerk of United States district court for the district of Montana, 1 copy

Clerk of United States court of appeals for the ninth circuit, 1 copy

Each county clerk of this state, for use of county officials and the public, 1 copy

State law library, 1 copy

State historical society, 1 copy

Each unit of the university of Montana, 1 copy

Law library of the university of Montana, 1 copy

Montana legislative council, 3 copies

Library of congress, 1 copy

State law library, for such exchanges as it may establish with libraries of other states, not to exceed fifty (50) copies

Law library of the university of Montana, for such exchanges as it may establish with institutions of higher education in other states, not to exceed fifty (50) copies

The secretary of state, clerk of each court of record in the state, clerk of each county in the state and the librarians for the state law library and the university of Montana law library shall maintain a complete, current set of the Code, including revisions thereto and additions or changes published in the Register. Such persons shall also maintain a file of rule-making notices published in the Register during the preceding two (2) years. The secretary of state shall also maintain a permanent Register of rule-making notices.

(f) The secretary of state shall make copies of and subscriptions to the Code, revisions thereto, and the Register available to any person at prices fixed to cover publication and mailing costs.

(g) The secretary of state shall determine the cost of supplying copies of the Code, revisions thereto and the Register. Such cost shall be the approximate cost of printing or duplicating and mailing. However, a uniform price per page or group of pages may be established without regard to differences in cost of printing different parts of the Code, revisions thereto, and the Register.

Comparable Provisions

Rev. Model Act, Section 5

Senate Bill No. 179, Section 205

Comment

At the present time there is no means of providing statewide notice of the existence or content of administrative rules. As noted in the previous comment, it is often difficult to determine if an agency has adopted rules and to obtain copies. The rules of some agencies can be seen only by examining the minutes of their meetings. Although many agencies

periodically publish their rules, copies are normally available only at their offices, which may or may not be in the state capitol. The published rules for some agencies are out of print and unavailable or are not current because they do not contain amendments.

Section 204 is designed to correct this situation. It provides for statewide distribution of complete, current copies of rules adopted by all agencies. It also provides for statewide distribution of rule-making notices.

Section 204(a) directs the secretary of state to publish a compilation of the rules for all state agencies called the Montana Administrative Code. The Code is to be published in loose-leaf form and will be distributed throughout the state (see section 204(e)). Each county will have at least one current set of the Code available for public inspection. The Code will be supplemented monthly by the Montana Administrative Register with rules adopted after publication of the Code.

The loose-leaf form of publication is specified because it is believed that it will be the most convenient and expedient means of keeping the Code current. As rules are amended, replacement pages will be published as part of the Register and can be slipped into the Code in the place of superseded pages. New rules can also be slipped in at appropriate places. The Code will always be current without the need for resorting to awkward pocket parts which would otherwise have to be published periodically. The loose-leaf format for the Code and Register combines the features of monthly notice of rule changes and continual revision.

To ensure that current copies of the Code are available throughout the state, section 204(e) specifies that the secretary of state, the clerks of the courts of record, the county clerks and the librarians for the state law library and the university of Montana law library maintain complete, current sets of the Code. In addition, section 204(e) directs the secretary of state to make subscriptions to the Code and Register available to any person at a charge to cover publication and mailing costs.

Section 204(d) requires that the Code be arranged in such fashion that there may be separate printings of the rules for individual agencies. This coordination between the secretary of state and individual agencies should result in cost savings to agencies. Section 201(a)(4) requires that agencies provide copies of rules upon request.

In addition to a Rules Section of the Register, there is a Notice Section. This section is the official vehicle for publication of rule-making notices, although other methods of publication must also be used where required by statute (see Section 203(a)(1)). The secretary of state, clerks of the courts of record, county clerks and law librarians are required to keep a file of such notices for the preceding two years. The two-year period is selected to correspond with the two-year limitation period set forth in Section 203(c) for challenging rules on the basis of irregularities in adoption procedures.

Where the publication of a rule in the Code or Register would be unduly burdensome, it may be omitted under section 204(c), provided that it is available

at the adopting agency and the Code or Register gives notice of its general contents.

Finally, section 204(g) gives the secretary of state flexibility in establishing charges to be made for the Code and Register.

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Section 205. PETITION FOR ADOPTION OF RULES.

An interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within sixty (60) days after submission of a petition, the agency either shall deny the petition in writing (stating its reasons for the denial) or shall initiate rule-making proceedings in accordance with section 202 of this act.

Comparable Provisions

Rev. Model Act, Section 6

Senate Bill No. 179, Section 207

Comment

Since public participation in the rule-making process is desirable, it is appropriate that there should be a provision for interested persons to petition an agency requesting the adoption, amendment or repeal of rules. This section is the same as section 6 of the Revised Model Act with one exception. The Revised Model Act requires that the agency act on a petition within 30 days. Section 205 specifies 60 days. Experience with a comparable provision in the Model Act, which set no limit, showed that agencies reacted slowly or not at all to petitions. Accordingly, a time limit is desirable. However, 60 days is more realistic for Montana in view of the fact that key personnel in many agencies are scattered around the state, making action within a 30-day period impractical.

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Section 206. JUDICIAL NOTICE OF RULES.

The courts shall take judicial notice of any rule filed and published under the provisions of this act.

Comparable Provisions

Rev. Model Act, none

Senate Bill No. 179, Section 208

Comment

The state supreme court has not always been willing to take judicial notice of administrative rules. In view of the filing and publication requirements in the MAPA, this requirement, which will eliminate the necessity for submitting proof as to the existence and authenticity of rules, is warranted.

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TITLE III - CONTESTED CASES

Section 301. NOTICE; HEARING; RECORD.

(a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include:

(1) a statement of the time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved;

(4) a short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(d) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) The record in a contested case shall include:

(1) all pleadings, motions, intermediate rulings;

(2) all evidence received or considered, including a stenographic record of oral proceedings;

(3) a statement of matters officially noticed;

(4) questions and offers of proof, objections, and rulings thereon;

(5) proposed findings and exceptions;

(6) any decision, opinion, or report by the hearing examiner or agency member presiding at the hearing;

(7) all staff memoranda or data submitted to the hearing examiner or members of the agency as evidence in connection with their consideration of the case.

(f) The stenographic record of oral proceedings or any part thereof shall be transcribed on request of any party. Unless otherwise provided by statute, the cost of the transcription shall be paid by the requesting party.

(g) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

Comparable Provisions

Rev. Model Act, Section 9

Senate Bill No. 179, Section 301

Comment

A "contested case" is one in which a determination of legal rights, duties or privileges must by law be made after an opportunity for a "trial-type" hearing. The Montana supreme court has recognized the right to notice and hearing in such cases as a matter of constitutional right, even though none is provided for by statute. In such proceedings basic due process requirements must be met.

Many state agencies have the "contested case" function. However, the statutes vary greatly with regard to notice and hearing. Some statutes are silent. Others mention the right, but do not give specific directions as to the requirements. Still others conform, either substantially or in part, with the provisions of section 301. In some instances, statutes make reference to notice and hearing for some of the agency's contested case functions, but not for others.

Similarly, statutes vary with regard to the record in contested cases. In many instances no mention is made of a record. In others, mention is made of a "record" or "minutes" of proceedings without giving specific directions as to the content. It is important that the content of the record be clearly specified and understood, because it is the basis for the agency's findings of fact and constitutes the record which is used for judicial review (see section 308(f)).

Section 301 contains fundamental requirements which are applicable to and appropriate for all contested case proceedings. It provides guidelines and requirements for all agencies to insure that basic requirements of due process are met.

Section 301(a) requires "reasonable notice" of hearing. The functions of state agencies and the requirements of areas which they regulate vary. What may be reasonable notice of hearing for one agency may be insufficient or unnecessarily long for another. Accordingly, a uniform notice period is not established.

Section 301(b) describes the required content of a notice of hearing. It assures that parties will be fully apprised of the time and place of the hearing, the purpose for the hearing and charges or matters to be considered. Section 301(c) affords parties the right to fully participate in the hearing.

The importance of the record has already been mentioned. In order to avoid unnecessary expense, a transcript of oral proceedings need not be prepared unless requested by a party. The requesting party must pay the expense of the transcript, unless a statute provides to the contrary.

Section 301 is the same as section 9 of the Revised Model Act with two exceptions. Language is added to subsections (e) and (f) to clarify the requirements regarding the record of oral proceedings and transcript. The words "as evidence" have been added to subsection (e)(7) so its provisions will not be interpreted to apply to legal memoranda which may be prepared for a decision maker.

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Section 302. RULES OF EVIDENCE; OFFICIAL NOTICE.

(a) Except as otherwise provided by statute, agencies shall not be bound by common law or statutory rules of evidence. They may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give

effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. Hearsay evidence may be admitted for the purpose of supplementing or explaining any direct evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection for such purposes in civil actions. Objections to evidentiary offers may be made and shall be noted in the record. When a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form.

(b) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

(c) A party shall have the right to conduct cross-examinations required for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence.

(d) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

Comparable Provisions

Rev. Model Act, Section 10

Senate Bill No. 179, Section 303

Comment

Statutory provisions relating to the admission or exclusion of evidence fall into four basic categories: those which require that agencies follow the rules of evidence which courts follow; those which state that agencies are not bound by the rules of evidence; those which are ambiguous; and those which are silent on the subject. The statutes for many agencies fall into the final category. Similarly, many statutes make no reference to the right to cross-examine. These are areas where agencies need specific direction if they are to properly perform the contested case function.

Section 302(a) provides that agencies are not bound by statutory or common law rules of evidence. This is a substantial departure from section 10(1) of the Revised Model Act which states that, "rules of evidence as applied in (non-jury) civil cases shall be followed." This requirement is relaxed when necessary to ascertain facts not reasonably susceptible of proof under those rules." In the latter situation a "prudent man" test is applied. This provision of the Revised Model Act has been criticized as being confusing even for lawyers to apply.

To a large degree, state administrative agencies are operated by persons who do not have legal training. For this reason, requiring that agency personnel comply with technical rules of evidence is not deemed to be practical or appropriate. Accordingly, this recommendation in the Revised Model Act, which may be subject to varying interpretations even by lawyers and is subject to an exception which is somewhat nebulous, has not been followed.

It is the author's conclusion that the rules of evidence should not be binding in contested case proceedings unless otherwise provided by statute. However, this does not mean that agencies do not have limitations or guidelines. Section 302(a) provides a standard for admission or exclusion of evidence and expressly limits the extent to which findings may be based upon hearsay evidence. An additional requirement which insures that agencies' findings will be based upon reliable evidence is found in section 308(g) of the MAPA relating to judicial review. A court may reverse an agency's findings which are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Thus, the findings of an agency must be based upon reliable evidence, irrespective of the evidence which is admitted during the hearing.

Section 302(a) is patterned after the Model Act and section 303 of Senate Bill No. 179. The remaining provisions of section 302 follow the Revised Model Act in providing for receipt of documentary evidence, cross-

examination and official notice. Language is added to section 302(c) regarding cross-examination to insure that an agency does not receive in evidence documents which are not subject to cross-examination.

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Section 303. HEARING EXAMINERS; CONDUCT OF HEARINGS; DISQUALIFICATION OF HEARING EXAMINERS AND AGENCY MEMBERS.

(a) An agency shall have authority to appoint hearing examiners for the conduct of hearings in contested cases.

(b) Agency members or hearing examiners presiding over hearings shall be authorized to administer oaths or affirmations; issue subpoenas pursuant to section 403 of this act; provide for the taking of testimony by deposition; regulate the course of hearings, including setting the time and place for continued hearings and fixing the time for filing of briefs or other documents; and direct parties to appear and confer to consider simplification of the issues by consent of the parties. All testimony shall be given under oath or affirmation.

(c) A hearing examiner or agency member shall withdraw from any contested case in which he cannot give fair and impartial hearing or consideration. Any party may request the disqualification of a hearing examiner or agency member on the ground of his inability to give a fair and impartial hearing or consideration by filing an affidavit, promptly upon discovery of the alleged disqualification, stating with particularity the grounds upon which the disqualification is claimed. The issue shall be determined promptly. If the charge is against a hearing examiner, the issue of disqualification shall be determined by the agency. If it is against a member of the agency, it shall be decided by the remaining members of the agency. If it affects all or a majority of the members of the agency, the issue shall be determined, upon petition filed by the agency, by the district

court where the hearing is being held, if the hearing is in progress, and, if the hearing is not in progress, by the district court for the county where the agency has its principle office. Upon the entry of an order of disqualification affecting a hearing examiner, the agency shall assign another in his stead or shall conduct the hearing itself. Upon the disqualification of a member of an agency, the governor immediately shall appoint a member pro tem to sit in place of the disqualified member in that proceeding.

Comparable Provisions

Rev. Model Act, (none)

Senate Bill No. 179, (none)

Comment

As indicated in the previous comment, many agencies have little direction with regard to the conduct of hearings. Only a few statutes provide for the appointment of hearing examiners, which may be a useful procedure for busy agencies, as well as for smaller agencies who wish to delegate the hearing function in contested cases to persons they feel to be more qualified to handle such matters.

Section 303(a) expressly gives agencies authority to appoint hearing examiners. Section 303(b) describes the authority which agency members and hearing examiners have in connection with the conduct of hearings. Although the provisions of these two sections may be implied by the nature of the contested case function or from other provisions of the MAPA, it is believed desirable that they be expressly stated to give proper guidance to agencies. The requirement that testimony be given under oath or affirmation is included because of the importance of the record made before the agency in the decisional process and for judicial review.

Section 303(c) relates to voluntary and involuntary disqualification of hearing examiners and agency members. It is felt that this is a matter which should be covered by statute.

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Section 304. EXAMINATION OF EVIDENCE BY AGENCY; PROPOSED ORDERS.

When in a contested case a majority of the officials of the agency who

are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section.

Comparable Provision

Rev. Model Act, Section 11

Senate Bill No. 179, Section 304

Comment

Section 304 is identical to section 11 of the Revised Model Act. The following comment, supplied by the Commissioners, explains the purpose of the section:

> The purpose of this section is to make certain that those persons who are responsible for the decision shall have mastered the record, either by hearing the evidence, or reading the record or at the very least receiving briefs and hearing oral argument. It is intended to preclude "signing on the dotted line."

No comparable requirement was found for any state agency.

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Section 305. FINAL ORDERS; NOTIFICATION.

(a) A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If,

in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

(b) Each agency shall index and make available for public inspection all final decisions and orders, including declaratory rulings under section 401, issued after the effective date of this act. No such agency decision or order shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof or when a state statute or federal statute or regulation prohibits public disclosure of the contents of a decision or order.

Comparable Provisions

Rev. Model Act, Sections 12, 2(a)(4) and 2(b)

Senate Bill No. 179, Section 305

Comment

Section 305(a) is the same as section 12 of the Revised Model Act. Its main purposes are to require that agency findings in contested cases go beyond general conclusions phrased in statutory language and to insure that parties are given notice of decisions. Agencies must state basic underlying fact and separate findings of fact from conclusions of law. Few state agencies are given specific statutory direction as to the form and content of decisions. The requirements contained in this section should refine the reasoning process employed by agencies, resulting in better decisions. In addition, decisions in the form required will provide a better basis for judicial review.

The statutes for many agencies do not require that their decisions be in writing or that they be served upon the parties. Although due process considerations would dictate that such requirements be met, it is felt that they should be provided for by statute to give agencies proper guidance.

Section 305(b) provides for public inspection of decisions and orders

of agencies. It is patterned after sections 2(a)(4) and 2(b) of the Revised Model Act. Changes have been made so that the public inspection requirement does not apply to decisions issued prior to the effective date of the act and decisions which, by state statute or federal statute or regulation, must be confidential.

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Section 306. EX PARTE CONSULTATIONS.

Unless required for the disposition of ex parte matters authorized by law, members, hearing examiners or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not, after issuance of notice of hearing, communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member

(a) may communicate with other members of the agency, and

(b) may have the aid and advice of one or more personal assistants.

Comparable Provisions

Rev. Model Act, Section 13

Senate Bill No. 179, (none)

Comment

It has been stated that "it is a fundamental principal of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert." Section 306 is patterned after section 13 of the Revised Model Act. The Commissioners' comment gives the following explanation:

> This section is intended to preclude litigious facts reaching the deciding minds without getting into the record. Also precluded is ex parte discussion of the law with the party or his representative. No objection is interposed to discussion of the law with other persons, e.g., the attorney general, or an outside expert.

The words "after issuance of notice of hearing" have been added in section 306 so that it will not be interpreted to apply to preliminary inquiries or investigation made to determine if formal contested case proceedings should be instituted. See the comment following section 102(c) defining "contested case."

No comparable restriction was found for any state agency.

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Section 307. LICENSES.

(a) When the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation or amendment of a license is required by law to be preceded by notice and opportunity for hearing, the provisions of this act concerning contested cases apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, annulment, withdrawal, or amendment of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

Comparable Provisions

Rev. Model Act, Section 14

Senate Bill No. 179, Section 105(a) and (b)

Comment

This section is substantially the same as section 14 of the Revised Model Act. The words "suspensions, annulment, withdrawal, limitation or amendment" have been added to subsection (a) and the word "amendment" has been added to subsection (c). In addition, the words "required by law" have been substituted for "required" in subsection (a). The intent of this section is to specifically include licensing among "contested cases."

With some exceptions, administrative licensing statutes provide for a hearing when a previously issued license is revoked or suspended. The language describing the possible actions that may be taken to revoke, suspend or otherwise effect a license is not as comprehensive as stated in section 307, but usually the right to a hearing is recognized. However, a number of statutes do not provide for a hearing where the initial application for a license is denied. Many of the licensing statutes permit or require agencies to deny licenses on the basis of discretionary considerations. Typical is a provision that an agency may or must deny a license if the applicant is not of "good moral character." Basic principles of fairness and due process require that when an agency bases the denial of a license upon such discretionary considerations, the applicant should have the right to a contested case hearing. The United States Supreme Court and state supreme courts have recognized the right to a hearing in such situations as a matter of constitutional right.

The words "required by law" as used in section 307(a) have the same broad meaning referred to in the comment under section 102(c), which defines "contested case." The intent of section 307 is to insure that contested case procedures will be followed in all licensing situations where a hearing is required by statute or as a matter of constitutional right, including the denial of a license on the basis of discretionary considerations.

Section 307(c) provides for summary license suspension where the public health, safety, or welfare is involved.

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Section 308. JUDICIAL REVIEW OF CONTESTED CASES.

(a) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this act. No other statutory, equitable or common law mode of review shall be available therefor, except to the extent that the decision may be reviewed in civil or criminal proceedings

for enforcement thereof.

A party who proceeded before an agency under the terms of a particular statute shall not be precluded from questioning the validity of that statute on judicial review, but such party may not raise any other question not raised before the agency, unless it is shown to the satisfaction of the court that there was good cause for failure to raise the question before the agency.

(b) Proceedings for review shall be instituted by filing a petition in district court within thirty (30) days after service of the final decision of the agency, or if a rehearing is requested, within thirty (30) days after the decision thereon. Except as otherwise provided by statute, the petition shall be filed in the district court for the county where the petitioner resides or has his principal place of business, or where the agency maintains its principal office. Copies of the petition shall be promptly served upon the agency and all parties of record.

The petition shall include a concise statement of the facts upon which jurisdiction and venue are based, a statement of the manner in which the petitioner is aggrieved and the ground or grounds specified in subsection (g) of this section upon which the petitioner contends he is entitled to relief. The petition shall demand the relief to which the petitioner believes he is entitled, and the demand for relief may be in the alternative.

The court, in its discretion, may permit interested parties to intervene

(c) Unless otherwise provided by statute, the filing of the petition shall not stay enforcement of the agency's decision. The agency may grant, or the reviewing court may order, a stay upon terms which it deems proper.

(d) Within thirty (30) days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the

reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) in violation of constitutional or statutory provisions;

(2) in excess of the statutory authority of the agency;

(3) made upon unlawful procedure;

(4) affected by other error of law;

(5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(7) because findings of fact, upon issues essential to the decision, were not made although requested.

Comparable Provisions

Rev. Model Act, Section 15

Senate Bill No. 179, Section 306

Comment

Section 308 provides for the mode and scope of judicial review in contested cases. Under the provisions of subsection 308(a) it is the sole mode of review available and pre-existing statutory or common law methods of review are eliminated.

Review is based upon the record made before the agency. The reviewing court may permit a party to submit additional evidence regarding the merits of the case. Such evidence is to be heard and considered by the agency before submission to the court. However, the court may hear evidence relating to alleged procedural irregularities before the agency.

The reviewing court may not substitute its judgment for that of the agency as to the weight of evidence on questions of fact. However, the court may reverse or modify the agency's determination if such findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Specific grounds for challenging the decision of an agency are set forth in subsection 308(g).

Section 308 follows section 15 of the Revised Model Act, with two exceptions. Under section 15(a) of the Revised Model Act, pre-existing methods of review are not eliminated. The Commissioner's comment indicates that this provision is inserted as a matter of expediency to eliminate opposition to passage of the act, not because it is considered to be the most desirable provision.

The Revised Model Act does not give any guidance as to the allegations which should be contained in a petition for review. It is believed that minimum requirements should be stated by statute. This has been done in

section 308(b).

Judicial review of agency decisions in one of the most confused and troublesome areas in the state administrative procedures. There is a lack of uniformity among agencies as to mode and scope of review. A number of statutes make no mention whatsoever of judicial review. Some mention only the right to appeal or review, but say little or nothing about how it should be accomplished or the extent to which a court may review the agency's findings. The statutes which are more specific with regard to method or scope of review lack uniformity and, in many cases are ambiguous and incomplete. The methods of review specifically provided for include trial de novo, certiorari and injunction.

It is the author's conclusion that there is no justification for the lack of uniformity in judicial review proceedings. This matter is discussed in some detail in the report of the study of state administrative procedures. It would not be practical to restate the discussion here. However, a few words about de novo review are deemed warranted. A number of statutes provide for de novo review specifically, some seem to provide for it by implication, and others specifically prohibit it. De novo review, even where specifically provided for, has no common meaning. Each statute seems to reflect a different concept of the term.

De novo review is abolished under section 308(a) along with other pre-existing forms of review because it causes wasteful and costly duplication of effort by courts and agencies. If a party can present a new or substantially different case to a court than was presented to the agency, there is no real purpose in having an agency hearing at all. Such procedures will only encourage parties to withhold evidence at the agency hearing so as not to fully advise the opposition of their case. Orderly administrative procedures should foreclose such practices. The procedural safeguards set forth in the contested case sections of the MAPA should eliminate any need which may previously have existed for de novo review.

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Section 309. APPEALS.

An aggrieved party may obtain review of a final judgment of a district court under this act by appeal to the supreme court within sixty (60) days after entry of judgment. Such appeal shall be taken in the manner provided by law for appeals from district courts in civil cases. Unless otherwise provided by statute or unless the agency has granted a stay through the completion of the judicial review process:

(a) if appeal is taken from a judgment of the district court affirming an agency decision, the agency decision shall not be stayed except upon order of the supreme court; except that, in cases where a stay is in effect at the time of the filing of notice of appeal, the stay shall be continued by operation of law for twenty (20) days from the date of filing of the notice;

(b) if appeal is taken from a judgment of the district court reversing or modifying an agency decision, the agency decision shall be stayed pending final determination of the appeal unless the supreme court orders otherwise.

Comparable Provisions

Rev. Model Act, Section 16

Senate Bill No. 179, Section 307

Comment

Section 309 contains the same basic provision for appeal of district court decisions to the state supreme court as is contained in the Revised Model Act. However, specific provision for continuing or discontinuing stays is added. This section is similar to section 307 of Senate Bill No. 179.

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TITLE IV - GENERAL PROVISIONS

Section 401. DECLARATORY RULINGS BY AGENCIES.

Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. A declaratory ruling, or the refusal to issue such a ruling, shall be subject to judicial review in the same manner as decisions or orders in contested cases.

Comparable Provisions

Rev. Model Act, Section 8

Senate Bill No. 179, Section 106

Comment

It is not uncommon for an individual to be uncertain as to whether particular activity which he contemplates would violate a statute or an agency rule or order. A dilemma results; forego the activity and avoid the potential problem, or engage in the activity and risk the consequences of violating a statute, rule or order. Section 401 is intended to eliminate the injustices created by such dilemmas by providing a procedure for agencies to make declaratory rulings.

Section 401 embodies the declaratory ruling provisions of the Revised Model Act with one addition. The final sentence has been modified (and language added) to insure that agencies do not have unlimited discretion in refusing to make declaratory rulings. The drafters of the Revised Model Act considered a requirement that declaratory rulings be made upon request of an interested party. It was concluded that this would place an impractical burden upon agencies. It is felt that this conclusion is justified. However, it is believed that the modification of the final sentence in section 401 will insure that declaratory rulings will be issued where the circumstances warrant.

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Section 402. DECLARATORY JUDGMENTS ON VALIDITY OR APPLICATION OF RULES.

The validity or application of a rule may be determined in an action for declaratory judgment if it is found that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action may be brought in the district court for the county in which the plaintiff resides or has his principal place of business, or in which the agency maintains its principal office. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

Comparable Provisions

Rev. Model Act, Section 7

Senate Bill No. 179, (none)

Comment

This section, like section 401, provides a means for determining controversies where individuals must know where they stand before taking definitive action. Although the authority conferred by the section is probably available under the Uniform Declaratory Judgments Act, it is included to insure that the procedure is available.

This section is identical to Section 7 of the Revised Model Act, with one exception, the word "found" has been substituted for "alleged" in the second line. This change was made to require that the court's authority to act is based upon a finding rather than a mere allegation.

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Section 403. SUBPOENAS AND ENFORCEMENT; COMPELLING TESTIMONY.

(a) An agency conducting any proceeding subject to this act shall have the power to require the furnishing of such information, the attendance of such witnesses, and the production of such books, records, papers, documents and other objects as may be necessary and proper for the purposes of the proceeding. In furtherance of this power, an agency upon its own motion may, and upon request of any party appearing in a contested case shall, issue subpoenas for witnesses or subpoenas duces tecum. The method for service of subpoenas, witness fees and mileage shall be the same as required in civil actions in the district courts of the state. Except as otherwise provided by statute, witness fees and mileage shall be paid by the party at whose request the subpoena was issued.

(b) In case of disobedience of any subpoena issued and served under this section or of the refusal of any witness to testify as to any material matter with regard to which he may be interrogated in a proceeding before the agency, the agency may apply to any district court in the state for an order to compel compliance with the subpoena or the giving of testimony. If the agency fails or refuses to seek enforcement of a subpoena issued at the request of a party, or to compel the giving of testimony deemed material by a party, the party may make such application. The court shall hear the matter as expeditiously as possible. If the disobedience or refusal

Comment

The statutes for some state agencies specifically provide for the right to counsel. It is felt that such a provision for all agencies is appropriate.

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Section 405. SERVICE.

Except where a statute expressly provides to the contrary, service in all agency proceedings subject to the provisions of this act and in proceedings for judicial review thereof, shall be as prescribed for civil actions in the district courts.

Comparable Provisions

Rev. Model Act, (none)

Senate Bill No. 179, Section 104

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Section 406. CONSTRUCTION AND EFFECT.

Nothing in this act shall be deemed to limit or repeal additional requirements imposed by statute or otherwise recognized law. No subsequent legislation shall be deemed to supersede or modify any provision of this act, whether by implication or otherwise, except to the extent that such legislation shall do so expressly.

Comparable Provisions

Rev. Model Act, (none)

Senate Bill No. 179, Section 501

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Section 407. REPEAL OF INCONSISTENT PROVISIONS.

All laws or parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Comparable Provisions

Rev. Model Act, (none)

Senate Bill No. 179, Section 503

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Section 408. SEVERABILITY.

The provisions of this act are severable, and if any part or provision thereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

Comparable Provisions

Rev. Model Act, Section 17

Senate Bill No. 179, Section 502

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Section 409. TIME OF TAKING EFFECT.

This act shall take effect on July 1, 1971, except that pending proceedings shall not be affected.

Comparable Provisions

Rev. Model Act, Section 19

Senate Bill No. 179, Section 504

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UNIFORM LAW COMMISSIONERS'

REVISED MODEL STATE ADMINISTRATIVE

PROCEDURE ACT

The following is the text of the Revised Model State Administrative Procedure Act which was drafted by the National Conference of Commissioners on Uniform State Laws and approved at its Annual Conference during the summer of 1961.

AN ACT Concerning Procedure of State Administrative Agencies and Review of Their Determinations.

[Be it enacted.....]

SECTION 1. [Definitions.] As used in this Act:

(1) "agency" means each state [board, commission, department, or officer], other than the legislature or the courts, authorized by law to make rules or to determine contested cases;

(2) "contested case" means a proceeding, including but not restricted to ratemaking, [price fixing], and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing;

(3) "license" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes;

(4) "licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;

(5) "party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party;

(6) "person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency;

(7) "rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (B) declaratory rulings issued pursuant to Section 8, or (C) intra-agency memoranda.

SECTION 2 [Public Information; Adoption of Rules; Availability of Rules and Orders.]

(a) In addition to other rule-making requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(3) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

(4) make available for public inspection all final orders, decisions, and opinions.

(b) No agency rule, order, or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

SECTION 3. [Procedure for Adoption of Rules.]

(a) Prior to the adoption, amendment, or repeal of any rule, the agency shall:

(1) give at least 20 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views thereon. The notice shall be mailed to all persons who have made timely request of the

agency for advance notice of its rule-making proceedings and shall be published in [here insert the medium of publication appropriate for the adopting state];

(2) afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. In case of substantive rules, opportunity for oral hearing must be granted if requested by 25 persons, by a governmental subdivision or agency, or by an association having not less than 25 members. The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption.

(b) If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 20 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period of not longer than 120 days [renewable once for a period not exceeding _____ days], but the adoption of an identical rule under subsections (a)(1) and (a)(2) of this Section is not precluded.

(c) No rule hereafter adopted is valid unless adopted in substantial compliance with this Section. A proceeding to contest any rule on the ground of non-compliance with the procedural requirements of this Section must be commenced within 2 years from the effective date of the rule.

SECTION 4. [Filing and Taking Effect of Rules.]

(a) Each agency shall file in the office of the [Secretary of State] a certified copy of each rule adopted by it, including all rules existing on the effective date of this Act. The [Secretary of State] shall keep a permanent register of the rules open to public inspection.

(b) Each rule hereafter adopted is effective 20 days after filing, except that:

(1) if a later date is required by statute or specified in the rule, the later date is the effective date;

(2) subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing with the [Secretary of State], or at a stated date less than 20 days thereafter, if the agency finds that

this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of the reasons therefor shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to the persons who may be affected by them.

SECTION 5. [Publication of Rules.]

(a) The [Secretary of State] shall compile, index and publish all effective rules adopted by each agency. Compilations shall be supplemented or revised as often as necessary [and at least once every 2 years].

(b) The [Secretary of State] shall publish a [monthly] bulletin setting forth the text of all rules filed during the preceding [month] excluding rules in effect upon the adoption of this Act.

(c) The [Secretary of State] may omit from the bulletin or compilation any rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if the rule in printed or processed form is made available on application to the adopting agency, and if the bulletin or compilation contains a notice stating the general subject matter of the omitted rule and stating how a copy thereof may be obtained.

(d) Bulletins and compilations shall be made available upon request to [agencies and officials of this State] free of charge and to other persons at prices fixed by the [Secretary of State] to cover mailing and publication costs.

SECTION 6. [Petition for Adoption of Rules.] An interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 30 days after submission of a petition, the agency either shall deny the petition in writing (stating its reasons for the denials) or shall initiate rule-making proceedings in accordance with Section 3.

SECTION 7. [Declaratory Judgment on Validity or Applicability of Rules.] The validity or applicability of a rule may be determined in an action for declaratory judgment in the [District Court of . . . County], if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

SECTION 8. [Declaratory Rulings by Agencies.] Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

SECTION 9. [Contested Cases; Notice; Hearing; Records.]

(a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include:

(1) a statement of the time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved;

(4) a short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(d) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) The record in a contested case shall include:

(1) all pleadings, motions, intermediate rulings;

(2) evidence received or considered;

(3) a statement of matters officially noticed;

(4) questions and offers of proof, objections, and rulings thereon;

(5) proposed findings and exceptions;

(6) any decision, opinion, or report by the officer presiding at the hearing;

(7) all staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.

(f) Oral proceedings or any part thereof shall be transcribed on request of any party.

(g) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

SECTION 10. [Rules of Evidence; Official Notice.] In contested cases:

(1) irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in [non-jury] civil cases in the [District Courts of this State] shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

[(2) documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original;]

(3) a party may conduct cross-examinations required for a full and true disclosure of the facts;

(4) notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

SECTION 11. [Examination of Evidence by Agency.] When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded

to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section.

SECTION 12. [Decisions and Orders.] A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

SECTION 13. [Ex Parte Consultations.] Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member

(1) may communicate with other members of the agency, and

(2) may have the aid and advice of one or more personal assistants.

SECTION 14. [Licenses.]

(a) When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this Act concerning contested cases apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave

notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

SECTION 15. [Judicial Review of Contested Cases.]

(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this Act. This Section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition in the [District Court of the _____ County] within [30] days after [mailing notice of] the final decision of the agency or, if a rehearing is requested, within [30] days after the decision thereon. Copies of the petition shall be served upon the agency and all parties of record.

(c) The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Within [30] days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in the procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) in violation of constitutional or statutory provisions;

(2) in excess of the statutory authority of the agency;

(3) made upon unlawful procedure;

(4) affected by other error of law;

(5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[SECTION 16. [Appeals.] An aggrieved party may obtain a review of any final judgment of the [District Court] under this Act by appeal to the [Supreme Court]. The appeal shall be taken as in other civil cases.]

[SECTION 17. [Severability.] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are severable.]

SECTION 18. [Repeal.] The following acts and parts of acts are repealed:

(1) ;

(2) ;

(3) .

SECTION 19. [Time of Taking Effect and Scope of Application.] This Act takes effect..... and (except as to proceedings then pending) applies to all agencies and agency proceedings not expressly exempted.

SENATE BILL NO. 179

Thirty-sixth Montana Legislative Assembly (1959)

TITLE I--GENERAL PROVISIONS

Section 101. Short title. This act may be cited as the Administrative Procedure Act.

Section 102. Definitions. For the purpose of this Act:

(a) "Agency" means any board, commission, department, officer, or other authority of the State government, whether or not having state-wide jurisdiction, authorized by law to make rules or to determine the legal rights, duties, or privileges of specific parties, except those in the legislative or judicial branches, and except any such agencies to the extent that they are concerned with the militia, with admission to and management of educational, penal or charitable institutions, with probation, parole, or pardons, or with public assistance.

(b) "Rule" includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, and includes the approval or prescription for the future of rates, wages, prices, facilities, services, or allowances therefor, but does not include regulations concerning only the internal management of the adopting agency or any other agency and not directly affecting the rights of or procedures available to the public. "Rule making" means any agency process for the adoption, amendment, or repeal of a rule.

(c) "Contested case" means a proceeding before an agency, in any matter other than rule making, in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after opportunity for an agency hearing. "Contested case" includes proceedings to determine whether an agency shall impose any form of penalty, including publication of reports that specific parties have violated statutes or rules, and includes licensing, but does not include proceedings in which agency decisions rest solely on inspections, tests, or elections. Except for the purposes of Section 306, "contested case" includes proceedings to determine whether an agency shall institute or recommend institution of court proceedings.

(d) "License" means the whole or part of any agency permit, certificate, approval, registration, charter, membership, authority, or other form of permission required by law. "Licensing" means any agency process respecting the grant, renewal, modification, limitation, suspension, revocation, or denial of a license.

(e) "Person" includes individuals, partnerships, corporations, associations, and public or private organizations of any character.

Section 103. Appearance and representation. Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel. In any agency proceeding every party shall be accorded the right to appear in person or by or with counsel.

Section 104. Service. Except where statutes otherwise specifically provide, service in all agency proceedings subject to the provisions of this Act, and in proceedings for the judicial review thereof, shall be as prescribed by this Code for service in civil actions.

Section 105. Licenses. (a) In any case in which application is made for a license, the agency, with due regard to the rights or privileges of all interested parties and adversely affected persons, shall with reasonable promptness set and complete any hearings or other proceedings required by law, make its decision, and notify the applicant and all other interested parties.

(b) Except in cases of willfulness or those in which public health or safety requires otherwise, no agency may suspend or revoke any license unless, prior to such suspension or revocation, the agency in writing brings to the attention of the licensee facts or conditions which may warrant such action and accords the licensee an opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application has been finally determined by the agency. This sub-section shall not apply:

(1) where the agency is required by statute to suspend, revoke, or refuse to renew a license, without exercising any discretion in the matter, on the basis of a court conviction or judgment; or

(2) where the suspension, revocation, or refusal to renew is based solely upon failure of the licensee to file timely reports or schedules, or to pay lawfully prescribed fees, or to maintain insurance coverage as required by any statute or rule.

Section 106. Petition for declaratory rulings by agencies. (a) On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court, or by the agency with the consent of the petitioner. Such a ruling is subject to judicial review in the manner provided in this Act for the review of decisions in contested cases.

(b) Petitions for declaratory rulings shall contain a reference to the rule or statute with respect to which the declaratory ruling is requested, a concise statement of facts describing the situation as to which the declaratory ruling is requested, and the reasons for the requested ruling.

(c) Within a reasonable time after receipt of a petition pursuant to this section, an agency shall either deny the petition in writing or schedule the matter for hearing and afford full opportunity for hearing to all interested parties. If the agency denies the petition, it shall promptly notify the petitioner of its decision, including a brief statement of the reasons therefor.

Section 107. Denials. Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding subject to this Act. Except (1) in affirming a prior denial or where the denial is self-explanatory, or (2) where Section 305 of this Act applies, such notice shall be accompanied by a simple statement of procedural or other grounds.

TITLE II -- RULES

Section 201. Adoption of rules. In addition to other rule-making requirements imposed by law:

(a) (1) Each agency shall adopt rules governing the formal and informal procedures prescribed or authorized by this Act, and no person shall in any manner be required to resort to procedures not so adopted. Such rules shall include rules of practice before the agency, together with forms and instructions.

(2) The Attorney General shall prepare and file with the Secretary of State model rules of procedure appropriate for use by as many agencies as possible. Any agency may adopt all or part of the model rules by reference. Notice of such adoption shall be filed and the model rules or parts thereof

shall become effective as to the adopting agency in the manner provided by Section 203 of this Act. No agency shall adopt, amend, or repeal the model rules or any part thereof unless it otherwise complies with the provisions of this section. The provisions of this Act relating to publication and distribution of rules shall apply to the model rules, except that the full text need not be published more than once if publication is made of reference to each adoption by an agency of all or part of the model rules, and in the case of partial adoption by an agency, to the specific rules or parts thereof adopted.

(b) To assist interested persons dealing with it, each agency shall so far as deemed practicable supplement its rules with descriptive statements of its procedures.

(c) Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall file written notice of its intended action with the Secretary of State and afford interested persons opportunity to submit data or views orally or in writing. The notice shall include (1) reference to the authority under which the rule is proposed; (2) either the text or substance of the proposed rule or a description of the subjects and issues involved; and (3) the place and time for hearing or for submission of written data or views, which shall in no case be less than ten days after publication of the notice as provided in Section 205 of this Act, or ten days after other publication if a different method of publication is prescribed by statute, or ten days after service if the notice is served on all persons who will be subject to the proposed rule. This subsection shall not apply to:

(1) rules adopted as emergency rules pursuant to Section 202 of this Act;

(2) statements of policy or interpretation;

(3) rules designed solely to bring the language of an existing rule into conformity with a statute changed or adopted since the adoption of the rule, to bring the language of an existing rule into conformity with a controlling judicial decision, or to comply with a federal requirement.

(4) rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs or signals;

(5) rules governing hunting and fishing.

(d) An agency may use informal conferences and consultations as means of obtaining the viewpoints and advice of interested persons with respect to contemplated rule making. Each agency may also appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rule making. The powers of such committees shall be advisory only.

(e) Rules shall not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting that language, the reference shall clearly indicate the portion of the language which is statutory and the portion which is the amplification of that language. Each rule shall include a citation of the authority pursuant to which it, or any part thereof, is adopted and, if an amendment, a reference to the original rule.

Section 202. Emergency rules. If an agency finds that immediate adoption of a rule is necessary for the preservation of the public health, safety, or welfare, the agency may adopt such a rule without notice as an emergency rule. The agency's finding and a brief statement of the reasons for its finding shall be incorporated in the rule. The agency shall file the rule as provided in Section 203 of this Act, and shall take such other steps as may be feasible to make the rule known to persons who will be affected by it. An emergency rule becomes effective immediately on filing, or on such later date as is specified in the rule, but may not remain in effect longer than sixty days.

Section 203. Filing and effective date of rules. Each agency shall file with the Secretary of State a certified copy of each rule adopted by it subsequent to the effective date of this Act. Each such rule shall become effective ten days after publication thereof, or publication of notice of adoption thereof, as provided in Section 205 of this Act, except:

(1) Rules as to which a later date is required by statute or specified in the rule;

(2) Rules served upon all persons subject thereto, which may be made effective ten days after such service;

(3) Emergency rules adopted pursuant to Section 202 of this Act;

(4) Rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs and signals, which may be made effective immediately on filing;

(5) Rules designed solely to bring the language of an existing rule into conformity with a statute changed or adopted since the adoption of the rule, to bring the language of an existing rule into conformity with a controlling judicial decision, or to comply with a federal requirement, which may be made effective immediately on filing;

(6) Rules governing hunting and fishing, which may be effective immediately on filing.

The Secretary of State is authorized to prescribe rules governing the format, style, and arrangement of rules filed with him, and may refuse to accept for filing any rule that is not in substantial compliance with such rules. He shall keep a permanent register of rules filed with him, which shall be open to public inspection, and shall furnish certified copies of any rule on request of any person, on payment of cost.

Section 204. Filing of existing rules. On or before December 1, 1959, each agency shall file with the Secretary of State a certified copy of each rule adopted by it on or before the effective date of this Act and remaining in effect. Any rule not so filed shall be deemed to have been abrogated by the agency and shall be void and of no effect.

Section 205. Publication of rules and notices. --(a) The Secretary of State shall, as soon as practicable after the effective date of this Act, compile, index, and publish in bound form the text of all rules adopted by each agency and remaining in effect. This compilation shall be entitled the "Montana Administrative Code" (hereinafter referred to as the Code), shall be revised as often as necessary and at least once every five years, and shall be supplemented by a cumulative annual supplement in pocket part form.

(b) The Secretary of State shall publish a monthly bulletin, to be entitled the "Montana Administrative Register" (hereinafter referred to as the Register), in which he shall set forth the text of all rules filed during the preceding month, excluding rules in effect on the effective date of this Act. Each issue of the Register shall also contain a notice section in which shall be published the text of all notices of proposed rule-making filed during the preceding month, except that if an agency certifies that it has served a notice on all persons who will be subject to a proposed rule, or that it has otherwise made publication of a notice pursuant to specific statutory requirements, the notice may be published in abbreviated form.

(c) The Secretary of State, with the approval of the adopting agency, may omit the following rules from the Code or the Register, or from both of them, if such rules are made available in printed or processed form on application to the adopting agency, and if the publication from which they are omitted contains a notice stating the general subject matter of the rules so omitted and stating where such rules may be inspected and how copies may be obtained:

(1) Rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs or signals;

(2) Rules and standards established by the federal government or by technical societies or organizations of recognized national standing, incorporated by reference in an agency's rules without reproduction in full, where the rules or

standards so incorporated are of limited public interest;

(3) Rules which an agency certifies it has served upon all persons subject thereto;

(4) Rules governing hunting and fishing.

Section 206. Distribution of rules. The Secretary of State shall distribute copies of each issue of the Code and Register without charge as follows:

Each agency filing rules under this Act, 1 copy
Attorney General, 1 copy
Clerk of each court of record of this State, 1 copy
Clerk of United States District Court for the District of Montana, 1 copy
Clerk of United States Court of Appeals for the Ninth Circuit, 1 copy
Each county attorney of this State,1 copy
Each county clerk of this State, for use of county officials and the public, 1 copy
State Law Library, 1 copy
State Historical Society, 1 copy
Each unit of the University of Montana, 1 copy
Law Library of Montana State University, 1 copy
Secretary of Senate of this State, 1 copy
Chief Clerk of House of Representatives of this State, 1 copy
Library of Congress, 1 copy
State Law Library, for such exchanges as it may establish with libraries of other states, not to exceed 50 copies
Law Library of Montana State University, for such exchanges as it may establish with institutions of higher education in other states, not to exceed 50 copies.

He shall make copies of or subscriptions to the Code and Register available to other persons at prices fixed to cover publication and mailing costs, and shall distribute copies of the notice section of the Register without charge to any person on request.

Any agency may arrange to obtain reprints of portions of the Code or Register containing its rules and distribute them at cost, or at less than cost if otherwise so authorized.

Section 207. Petition for adoption of rules. Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Within a reasonable time after the receipt of such a petition, an agency shall either deny the petition in writing, with a brief statement of its reasons for the denial, or proceed with the requested rule making. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

Section 208. Judicial notice of rules. -- The courts shall take judicial notice of any rule duly filed and published under the provisions of this Act.

Section 209. Declaratory judgment on validity of rules. --(a) The validity of any rule may be determined upon petition for a declaratory judgment thereon, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. The petition shall be addressed to the district court for the county in which the petitioner resides or had his principal place of business, or in which the agency maintains its principal office. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

(c) This section is in addition to and not in substitution for remedies otherwise available.

TITLE III -- CONTESTED CASES

Section 301. Contested cases; notice, hearing, record. --In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice, which shall in no case be less than ten days. The notice shall state the time, place and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present oral and documentary evidence, briefs, and oral argument with respect thereto. Any agency officer authorized to hold or participate in the holding of hearings may administer oaths or affirmations and take depositions in contested cases. In each contested case the agency shall prepare an official record, which shall include the testimony and exhibits and all pleadings and other documents filed by parties or by the agency, but it shall not be necessary to transcribe shorthand notes or sound recordings unless requested for purposes of rehearing or court review. The agency shall furnish copies of the transcript of record to any party on payment of a uniform charge fixed by the agency or otherwise prescribed by law. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default. Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases.

Section 302. Subpoenas. (a) Agencies authorized by law to issue subpoenas, including subpoenas duces tecum, shall issue such subpoenas to any party to a contested case upon request and, to the extent required by agency rule, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Witness fees and mileage shall be the same as provided for witnesses in the district courts, and except as otherwise provided by law shall be paid by the party at whose request the subpoena was issued.

(b) Except where a different method of enforcement is prescribed by statute: In case of failure or refusal on the part of any person to comply with an agency subpoena, or in case of the refusal of any witness to testify as to any material matter regarding which he may be interrogated, any district court in this State, upon good cause shown by the application of the agency, may issue a warrant of attachment for such person and if after hearing the court finds his failure or refusal to be unjustified, compel him to comply with such subpoena, and to attend before the agency and produce any subpoenaed records, books, and documents for examination, and to give his testimony. Such court shall have the power to punish for contempt as in the case of disobedience to a like subpoena issued by the court, or for refusal to testify therein.

Section 303. Rules of evidence; official notice. -- In contested cases:

(1) Agencies shall not be bound by common law or statutory rules of evidence. They may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. Hearsay evidence may be admitted for the purpose of supplementing or explaining any direct evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(2) All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other facutal information or evidence may be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(3) Every party shall have the right of cross-examination of witnesses, which shall include the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence, and shall have the right to submit rebuttal evidence.

(4) Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so notice. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

Section 304. Examination of evidence by agency. Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portion thereof as may be cited by the parties. The parties may by written stipulation waive compliance with this section.

Section 305. Decisions and orders. Every decision and order rendered by an agency in a contested case shall be in writing or stated in the record and shall be served forthwith on each party or his attorney of record. Every agency shall index and make available to public inspection all decisions and orders in contested cases. If such decision or order is adverse to a party to the proceeding, it shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. If a statute or rule affords a right of or right to request rehearing, reconsideration, or appeal within the agency, the decision or order shall also be accompanied by a notice of such right and of the time limits thereon.

Section 306. Judicial review of contested cases. -- (a) Right of review. Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this Act, and no other statutory, equitable, or common law mode of review shall be available therefor except to the extent that the decision may be reviewed in civil or criminal proceedings for the enforcement thereof. This section shall not apply to decisions as to which statutes preclude judicial review, to decisions of the Industrial Accident Board, the Oil and Gas Conservation Commission, or the Board of Railroad Commissioners, or to decisions of the State Board of Equalization relating to taxes or license fees.

Where a statute or rule requires or permits an application for a rehearing or other method of review by an agency, and an application for such rehearing or review is made, no decision of such agency shall be final as to the party applying therefor until such rehearing or review is had or denied. If under the terms of a statute governing procedure before an agency a decision has become final because of failure to file any document in the nature of objections, protests, petition for hearing or application for agency review within the time allowed by such statute, such decision shall not be subject to judicial review hereunder excepting only for the purpose of questioning the jurisdiction of the agency over the person or subject matter.

A party who proceeded before an agency under the terms of a particular statute shall not be precluded from questioning the validity of that statute on judicial review, but such party may not raise any other question not raised before the agency unless allowed by the court upon due cause shown.

(b) Institution of review proceedings. Proceedings for review shall be instituted by filing a petition in the district court within thirty days after the service of the final decision of the agency. Except where statutes otherwise provide, the petition shall be filed in the district court for the county where the petitioner resides or has his principal place of business, or where the agency maintains its principal office. The petition shall include a concise statement of the facts upon which jurisdiction and venue are based, facts showing that the petitioner is aggrieved, and the ground or grounds specified in subsection (g) of this section upon which petitioner contends he is entitled to relief. The petition shall demand the relief to which petitioner believes he is entitled, which demand may be in the alternative. Copies of the petition shall be served upon the agency and all other parties of record, and summons shall issue as in other civil actions. The court, in its discretion, may require petitioner to execute a bond with sufficient sureties, in such amount and upon such conditions as the court may direct, or to file a deposit in lieu thereof. The court, in its discretion, may permit other interested persons to intervene.

(c) Stay. The filing of the petition shall not stay enforcement of the agency decision; but the agency may do so, or the reviewing court may order a stay upon such terms as it deems proper.

(d) Record on review. Within thirty days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the record of the proceeding under review. The record shall consist of (1) the entire official record as specified in Section 301 of this Act, or (2) such portions thereof as the agency and the parties may stipulate, or (3) a statement of the case agreed to by the agency and the parties. The court may require or permit subsequent corrections or additions to the record when deemed desirable. The expense of preparing and filing the record shall be taxed as a part of the costs and charged against the losing party, except where statutes otherwise specifically provide and except that any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional expense caused by such refusal.

(e) Additional evidence. If, before the date set for hearing, application is made to the court for leave to present additional evidence to the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional

evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) Mode of review. The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(g) Scope of review. The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) in violation of constitutional provisions ; or

(2) in excess of the statutory authority or jurisdiction of the agency; or

(3) made upon unlawful procedure; or

(4) affected by other error of law; or

(5) unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or

(6) artibrary or capricious or in abuse of discretion.

(h) Unreasonable delay. Unreasonable delay on the part of any agency in deciding a contested case shall be grounds for an order of the court compelling action by the agency or removing the case to the court for decision.

Section 307. Appeals. An aggrieved party may secure a review of any final judgment of the district court under this Act by appeal to the Supreme Court within sixty days after entry of the judgment. Such appeal shall be taken in the manner provided by law for appeals from the district court in other civil cases. If appeal is taken from a judgment of the district court affirming an agency decision, the agency decision shall not be stayed except upon the order of the Supreme Court, except that, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for twenty days from the filing of the notice. If appeal is taken from a judgment of the district court reversing or modifying an agency decision, the agency decision shall be stayed pending final determination of the appeal unless the Supreme Court otherwise orders.

TITLE IV -- AMENDMENTS TO EXISTING LAWS

(Omitted)

TITLE V -- CONSTRUCTION AND EFFECT

Section 501. Construction and effect. Nothing in this Act shall be deemed to limit or repeal additional requirements imposed by statute or otherwise recognized by law. No subsequent legislation shall be deemed to supersede or modify any provision of this Act, whether by implication or otherwise, except to the extent that such legislation shall do so expressly.

Section 502. Severability. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Section 503. Repeal. All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed.

Section 504. Time of taking effect. This Act shall take effect July 1, 1959, except that pending proceedings shall not be affected.